90-568

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

IN THE MATTER OF:
N. DENNEY CRISP AND SANDRA A. CRISP, DEBTORS

N. DENNEY CRISP AND SANDRA A. CRISP,
Petitioners,
vs.
CHARLES E. RUBIN,TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether, given the bankruptcy code's policy favoring discharge of debtors in bankruptcy, a heightened standard of review should be utilized in reviewing bankruptcy court decisions in cases where discharge is denied.

LIST OF PARTIES

The parties before this Court include the petitioners Dr. N. Denney Crisp and Mrs. Sandra A. Crisp. The respondent is Mr. Charles E. Rubin, court appointed trustee in bankruptcy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Dr. N. Denney Crisp and Mrs. Sandra A. Crisp, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 27, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on March 27, 1990. The opinion is unpublished, but has been reprinted in the appendix.

The opinion of the United States District Court for the Western District of Missouri (Stevens, D.J.) was filed on May 3, 1989. That opinion has been reprinted in the appendix.

JURISDICTION

On March 11, 1987, the Bankruptcy Court entered its final judgment denying the petitioners discharge in bankruptcy. On March 20, 1987, the petitioners filed their Notice of Appeal to the United States District Court for the Western District of Missouri. The district court's jurisdiction was invoked pursuant to 28 U.S.C. Section 158 (a).

On May 3, 1989, the district court affirmed the bankruptcy court's order denying the petitioners' discharge in bankruptcy. A Notice of Appeal was timely filed, and the district court's order was appealled to the United States Court of Appeals for the Eighth Circuit, whose jurisdiction was invoked pursuant to 28 U.S.C. Section 1291.

The Court of Appeals affirmed the district court's order on March 27, 1990. The petitioners' motions for rehearing and rehearing *en banc* were denied May 30, 1990.

On August 29, 1990, Justice Blackmun ordered that the time for filing this petition for writ of *certiorari* be extended to and including September 27, 1990. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1257 (3).

STATUTES INVOLVED

11 U.S.C. section 727 (a) (3)

> The court shall grant the debtor a discharge, unless . . . The debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records,

and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

STATEMENT OF THE CASE

The petitioners, N. Denney Crisp and Sandra A. Crisp, operate a medical clinic in Independence, Missouri. Mr. Crisp is a medical doctor, and Mrs. Crisp is a registered nurse. On July 15, 1982, Dr. and Mrs. Crisp filed a petition for relief and reorganization under Chapter 11 of the Bankruptcy Code. At the time of filing, Dr. and Mrs. Crisp were involved as plaintiffs in three lawsuits, known as the *Crum and Long, Kinsports* and *First National Bank of Bethany* cases. The disposition of these cases had a significant impact upon the formulation of the Crisp's proposed plan of reorganization, as substantial recovery in all three cases was anticipated.

In January of 1984, the *First National Bank of Bethany* case was settled, as ordered by the bankruptcy court, for much less than the anticipated value of the suit. This prompted Dr. and Mrs. Crisp to file an Amended Plan of Reorganization and Disclosure Statement. Prior to the filing of an amended plan of reorganization, the bankruptcy court entered an order, on May 9, 1985, appointing examiners and setting the date for the filing of the amended plan. As indicated by the record, one of the examiners, Mr. Dennis R. Dow, was appointed to examine the monthly financial reports filed by Dr. and Mrs. Crisp with the bankruptcy court.

Mr. Dow was to determine whether or not those monthly financial reports accurately and fully reflected the income and expenses of Dr. and Mrs. Crisp.

Subsequently, Mr. Dow reported to the bankruptcy court that, based upon a review of Dr. and Mrs. Crisp's accounting system, underlying record documentation, computer printouts of daily transactions and computer generated compilations of those figures, the monthly financial reports were indeed accurate. The record establishes that Mr. Dow made no complaints to the Crisps' counsel, Mr. John Trader, regarding the adequacy of Dr. and Mrs. Crisp's record keeping methods.

On August 30, 1985, the bankruptcy court converted the case from Chapter 11 reorganization to Chapter 7 liquidation, and appointed the respondent, Mr. Charles E. Rubin, as trustee. Additionally, on September 19, 1985, the bankruptcy court entered its order scheduling the creditors' meeting for October 30, 1985, and setting December 30, 1985, as the last date for filing complaints either objecting to Dr. and Mrs. Crisp's discharge, or to determine dischargeability of any debts.

The record indicates that prior to the creditors' meeting, Mr. Robert A. Pummill, counsel for the trustee, contacted Mr. Trader inquiring as to the existance of any accounts receivable, as Dr. Crisp was continuing to operate his medical practice. Mr. Trader informed Mr. Pummill that accounts receivable existed, but that he would have to obtain specific information from Dr. Crisp.

The creditors' meeting was held on October 30, 1985, at which time the issue of Dr. Crisp's accounts receivable was discussed. The trustee indicated that he wanted a complete list of Dr. Crisp's accounts receivable as of August 30, 1985. Mr. Trader objected, claiming that the trustee had no right to the accounts receivable because, first, they were exempt from the estate, and, second, providing such a list would violate Dr. Crisp's duty of confidentiality to his patients.

In light of Mr. Trader's objections and after further discussion, an agreement was reached that Dr. Crisp would provide a list of his accounts receivable as of August 30, 1985, but that in order to maintain Dr. Crisp's confidentiality with his patients, Mr. Rubin would not use the list to collect money from those patients. As to Mr. Trader's assertion of the exempt status of Dr. Crisp's accounts receivable, the parties agreed that Mr. Rubin would file a complaint for turnover of the contested funds. An adversary proceeding was commenced and later dismissed because the trustee failed to make a submissible case.

Also present at the creditors' meeting was Mr. Jack Bohm, an attorney for a creditor, A.M. Leasing, which leased computer equipment to Dr. and Mrs. Crisp. At that time, Mr. Bohm announced to the parties that A.M. Leasing was in a position to reposess the computer equipment which it had leased to the debtors because, since A.M. Leasing had had a motion pending for relief from the automatic stay for more than thirty days, the stay was automatically dissolved pursuant to 11 U.S.C. Section 363(e).

The record indicates that Dr. Crisp informed those present that the accounts receivable information sought by Mr. Rubin was stored on a disk in the computer leased from A.M. Leasing. Mr. Rubin then stated to Mr. Bohm that when the equipment was being repossessed, he should avoid taking the data disks containing Dr. Crisp's records. Later that day, agents from A.M. Leasing appeared at Dr. Crisp's office and repossessed the computer equipment. This was the crucial event in this case. In regard to this event, there appears to be a factual discrepancy between the lower courts' findings and what actually appears on the transcript record.

The district court found that Mr. Bohm was present during the repossession and that Dr. Crisp had the opportunity to observe the repossession. However, the record indicates that Mr. Bohm was not present, but that a Mr. Stanridge, an attorney from Mr. Bohm's office, was there for part of the time while the equipment was being repossessed. Furthermore, the record indicates that while Dr. Crisp was at his office during the repossession, he did not have the opportunity to observe all facets of the repossession, as he was busy attending to his patients. These facts are relevant due to the subsequent discovery that A.M. Leasing had indeed taken the disks containing Dr. Crisp's accounts receivable data along with the computer hardware.

Following the repossession of the computer equipment, Mr. Rubin and Mr. Pummill attempted to obtain the information on Dr. Crisp's accounts receivables. They learned that the information sought had been taken when

A.M. Leasing repossessed the computer equipment. Specifically, the missing data consisted of Dr. Crisp's accounts receivables for July and August 1985. The parties then contacted A.M. Leasing to obtain the return of the data disks containing Dr. Crisp's records. A.M. Leasing returned some disks. However, those disks did not contain the information sought by the trustee.

Mr. Trader then informed Mr. Rubin and Mr. Pummill that the data could be reconstructed from copies of bills, receipts, statements and various documents which Dr. Crisp maintained in his office. Given these circumstances, Ms. Angela Rexwinkle, a certified public accountant employed with Mr. Rubin's office, was appointed to supervise reconstruction of the July and August 1985 records. However, the record shows that Ms. Rexwinkle made no efforts to obtain the documents from Dr. Crisp or Mr. Trader.

Finally, on September 30, 1986, Mr. Rubin filed a Complaint Objecting to Discharge, alleging that Dr. and Mrs. Crisp failed to keep or preserve books, records, documents and papers from which their financial condition or business transactions might be ascertained. The basis of this allegation rested upon the trustee's failure to obtain Dr. Crisp's accounts receivable records for July and August 1985. Trial was held on January 13 and 14, 1987. On March 11, 1987, the bankruptcy court entered its judgment denying the petitioners' discharges in bankruptcy. The bankruptcy court found that Dr. and Mrs. Crisp failed to keep adequate records as required by 11 U.S.C. Section 727(a) (3), in that they did not take adequate precautions to prevent the repossession of the computer disks.

The bankruptcy court alternatively found that Dr. and Mrs. Crisp concealed the back up records and documents, from which the accounts receivable information was to be reconstructed, by failing to turn it over to the trustee. This latter finding was made despite the fact that the documents were available during the entire proceeding. The record reveals that at no time did the trustee engage in any discovery in an attempt to obtain those records, even during the course of adversary proceedings relating to the exemption of the accounts receivable from the bankruptcy estate.

Appeal was first taken to the United States District Court for the Western District of Missouri, which affirmed the bankruptcy court's judgment. At that point, Dr. and Mrs. Crisp appealled to the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's opinion.

REASONS FOR GRANTING THE WRIT

Dr. and Mrs. Crisp are placed in an extremely difficult and unfair position due to the bankruptcy court's denial of their discharge in bankruptcy. The bankruptcy court denied discharge pursuant to Title 11 U.S.C., Section 727(a)(3), which requires a court to grant discharge to a debtor unless it finds that the debtor "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information...from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case."

The basis of the bankruptcy court's denial of discharge was that, first, Dr. and Mrs. Crisp failed to keep or preserve adequate records regarding their financial condition and business transactions, and, second, that they concealed those records from the trustee. The bankruptcy court made this determination due to the loss of the electronic data regarding Dr. Crisp's accounts receivables for the months of July and August 1985. That data had been stored on the computer disks which were repossessed, with the court's sanction, by creditor A.M. Leasing.

The general rule governing such circumstances is that a loss of records due to circumstances beyond a debtor's control does not warrant a denial of discharge. *In re Kirst*, 37 B.R. 275, 277 (Bankr E.D. Wis. 1983). The central question in regard to the rule enunciated in *In re Kirst*, as perceived by the lower courts and as applied to the circumstances faced by Dr. and Mrs. Crisp, is: to what extent did Dr. and Mrs. Crisp actively fail to preserve the data on the computer disks by preventing their repossession by A.M. Leasing.

To answer this question, a number of pertinent items can be found in the record. First, at the creditors' meeting held on October 30, 1985, Mr. Bohm, attorney for A.M. Leasing, was specifically warned by the trustee, Mr. Rubin, to ensure that A.M. Leasing did not repossess the computer disks containing Dr. Crisp's financial data. (Curiously, the opinions of the bankruptcy court and the district court recite that Mr. Bohm was present while agents of A.M. Leasing were repossessing the computer equipment from Dr. Crisp's office. The transcript record, however, indicates that this

was not the case. Instead, another attorney from Mr. Bohm's office was present part of the time.)

The lower court opinions also recite that Dr. Crisp had an opportunity to oversee the repossession of the computer equipment and prevent A.M. Leasing from taking the disks containing his July and August 1985 accounts receivable data. These findings, however, fly in the face of the transcript records which indicate that although Dr. Crisp was physically present at his medical office, he was busy attending to his patients and did not have the opportunity to oversee all facets of the repossession. So, Dr. Crisp relied on Mr. Bohm's representations that the disks in question would not be repossessed. The courts below cite no evidence on the record to the contrary.

With evidence of this nature clearly in the record, it is difficult to see how the bankruptcy court could have denied discharge under 11 U.S.C. Section 727(a)(3). The application of 11 U.S.C. Section 727(a)(3) to the circumstances faced by Dr. and Mrs. Crisp is even more strained by the recognition that the record also shows that an alternative means existed of obtaining the data which was on the missing computer disks.

Prior to entry into the computer, all the necessary data regarding Dr. Crisp's accounts receivables was in the form of bills, receipts, statements and various documents. All of these records were maintained upon the premises of Dr. Crisp's medical clinic. The bankruptcy court's conclusion was that the existence of these documents was essentially

irrelevant because Dr. Crisp concealed these documents from the trustee. The district court agreed with the bankruptcy court's conclusions. These conclusions are factually incorrect. The record establishes that Dr. Crisp and his attorney, Mr. Trader, informed Mr. Rubin that the records were available to him.

The availability of the documents was recognized by the bankruptcy court when it appointed Ms. Angela Rexwinkle, a certified public accountant with Mr. Rubin's office, to supervise the compilation of Dr. Crisp's accounts receivables for July and August 1985. As the record shows, even though Dr. Crisp and Mr. Trader offered to make the records available, Ms. Rexwinkle and Mr. Rubin made no efforts to examine the documents. These circumstances clearly do not constitute concealment under 11 U.S.C. Section 727 (a) (3).

These events give rise to the primary issue, namely, the standard of review utilized by district courts in reviewing bankruptcy court decisions. Currently, a district court reviewing decisions of a bankruptcy court shall not set aside findings of fact unless they are clearly erroneous. Bankruptcy Rule 8013. However, the standard differs for review of conclusions of law, where the district court will engage in *de novo* review. *In re Pierce*, 809 F.2d 1356, 1359 (8th Cir. 1987).

When evaluating discharge of debts under 11 U.S.C. Section 727 (a) (3), the initial burden of proof is on the creditors to show a lack of records. *In re Savel*, 29 B.R. 854,

856 (Bankr. S.D. Fla. 1983). In this case, the record shows that neither the trustee nor any creditors ever met this burden. The bankruptcy court's decision was based on the unavailability of the computer records. However, the Bankruptcy Code sets no requirements as to the form in which a debtor's financial records must be kept. Dr. Crisp maintained the documentation underlying the computer records of his accounts receivable in his office at all times. These documents were consistently available to the trustee and the court appointed accountant who was to compile Dr. Crisp's accounts receivable data. Under the terms of 11 U.S.C. Section 727 (a) (3) and the standard delineated in *In re Savel*, combined with a review of the record, it is astonishing that Dr. and Mrs. Crisp could have been denied discharge.

The unjust result in this case makes a compelling argument for a heightened standard of review in instances where debtors have been denied discharge in bankruptcy. The public policy underlying the Bankruptcy Code clearly favors discharge of debtors in bankruptcy. This is recognized as one of the basic purposes of bankruptcy law, namely, giving debtors a "fresh start". King and Cook, *Creditors' Rights, Debtors' Protection and Bankruptcy* 777 (1985). The district court, in this case should have made a *de novo* review, in fact, of the bankruptcy court's findings. Instead, it merely determined that the bankruptcy court's findings were not clearly erroneous.

De novo review is not urged in all cases where a district court reviews the decisions of bankruptcy courts,

but only where the bankruptcy court denies discharge. Such a rule would have the effect of more clearly effectuating the underlying public policy of the Bankruptcy Code.

CONCLUSION

This case presents the Supreme Court with the opportunity to establish the proper standard of review in the appellate review of bankruptcy court denials of discharge. For this reason, *certiorari* should be granted.

Respectfully submitted,
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APPENDIX

(Filed March 27, 1990)

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

89-1915

N. DENNEY CRISP AND SANDRA A. CRISP,
Debtors
N. DENNEY CRISP AND SANDRA A. CRISP,
Appellants,
vs.
CHARLES E. RUBIN, TRUSTEE,
Appellee,

Appeal From the United States District Court
for the Western District of Missouri
Submitted: March 12, 1990
(UNPUBLISHED)

Before FAGG, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

The bankruptcy court refused to grant a discharge in bankruptcy to N. Denny Crisp and Sandra A. Crisp because the Crisps concealed or failed to keep and preserve adequate records as required by 11 U.S.C. § 727(a) (3) (1982). The district court affirmed the bankruptcy court in a careful,

thorough opinion, which we find dispositive of the issues presented by this appeal. The judgment of the district court is affirmed. See 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

(Filed May 30, 1990)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

89-1915WM

N. DENNEY CRISP AND SANDRA A. CRISP,
Appellants,
vs.
CHARLES E. RUBIN, TRUSTEE,
Appellee.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc.

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit

(Filed May 3, 1989)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

87-0780-CV-W-8

N. DENNEY CRISP AND SANDRA A. CRISP,
Debtors
N. DENNEY CRISP AND SANDRA A. CRISP,
Appellants,
vs.
CHARLES E. RUBIN, TRUSTEE,
Appellee,

OPINION

This is an appeal from the bankruptcy court's order denying appellants' discharge in bankruptcy under Chapter 7 because of the failure to keep and preserve adequate records as required by 11 U.S.C. § 727(a)(3). The court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a). For the reasons discussed hereafter, the decision of the bankruptcy court will be affirmed.

I. BACKGROUND

The facts of this case, as found by the bankruptcy court, are as follows. The appellant debtors filed their petition for relief and reorganization under Chapter 11 of the Bankruptcy Code on July 15, 1982. After three years

without the submission of a confirmable reorganization plan and upon motion of the Unsecured Creditors Committee, the Chapter 11 proceedings were converted to liquidation proceedings under Chapter 7 on August 30, 1985. Charles E. Rubin, appellee in the present action, was subsequently appointed as Trustee.

On October 30, 1986, a creditors meeting was held pursuant to 11 U.S.C. § 341 ("Section 341 meeting"). Among those present at the meeting were Mr. Rubin and his counsel, Robert Pummill, the debtors and their counsel, John Trader, and Jack Bohm, an attorney for creditor A.M. Leasing, which leased computer equipment to the debtors. At the meeting, Mr. Rubin raised concerns about the existence and location of Dr. Crisp's accounts receivable records in his medical practice.[1] Thereafter, Mr. Bohm informed the parties that A.M. Leasing was now in a position to repossess the computer equipment it leased to Dr. Crisp.[2] Dr. Crisp then interjected that the accounts receivable information was stored on a disk in the computer. Mr. Rubin subsequently admonished Mr. Bohm that, when the time came to repossess the equipment, care should be taken to avoid repossessing the data disks containing Dr. Crisp's records. Moreover, Mr. Rubin made it clear that he was claiming, on behalf of the estate, the right to all existing

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[1]According to Mr. Pummill's testimony, his inquiry into the whereabouts of accounts receivable information began in September of 1985, when Mr. Trader confirmed that such records existed and that they would soon be made available.

[2]Mr. Bohm's position was that since A.M. Leasing had a motion pending for relief from the automatic stay for more than thirty days, the stay was automatically dissolved pursuant to 11 U.S.C. § 363(e).

accounts receivable, as well as to all available information concerning those accounts.

Later that day Jack Bohm and agents of A.M. Leasing appeared at Dr. Crisp's office in order to repossess the computer equipment. Dr. Crisp was present at this time, was able to observe the repossession, and at no time protested that the repossessing parties were taking anything to which they were not entitled.

Following the repossession, the trustee continued to demand that the debtors supply amended schedules containing a listing of all accounts receivable. Debtors' counsel, Mr. Trader,provided only statistical material summarizing the overall amounts of receivables due. Debtors declined to submit a specific name and address list of account debtors, claiming that such information was "privileged" under the theory of *In re Fitzsimmons*, 725 F.2d 1208 (9th Cir. 1984).[3] Dr. Crisp later testified that these concerns about privilege dissipated and that he was willing to turn over all relevant documents. But as luck would have it, the data disks which contained the most recent accounts information were appar-

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[3]Debtors once maintained that this information was confidential as a matter of physician/patient privilege, but have since abandoned this position. Debtors now contend that because the accounts receivable are arguably "exempt" as income generated by Dr. Crisp's personal services under the rule of *In re Fitzsimmons, supra*, they need not provide these records. However, the disclosure policy under section 727(a) (3) clearly requires the debtor to turn over "any recorded information . . . from which the debtor's financial condition or business transactions might be assessed." Merely because some of this information may reference "exempt" income is no reason for failing to comply with section 727(a) (3). *See, e.g., In re Silverman*, 10 Bankr. 727, 731 (Bankr. S.D.N.Y. 1981).

ently lost at the time the computer system was repossessed.[4] Informed of this possibility by debtors' counsel, Mr. Rubin and Mr. Pummill contacted A.M. Leasing, which turned over all disks that were repossessed with the computer. On or about December 2, 1985, it was determined that none of these disks contained any accounts data. Mr. Pummill later testified that Mr. Trader informed him that the accounts records could not be provided because they were "lost in the computer."[5]

Although the records themselves were missing, the parties proposed to attempt to "reconstruct" the accounts listings from various remaining receipts, statements, and assorted documents. Angela Rexwinkle, an office assistant of the trustee, was appointed to superintend this process. However, with both sides claiming inertia on the part of the other, no progress was ever made on reconstructing the detailed listings. Debtors never supplied the "back-up" information which Dr. Crisp claimed existed; nor, apparently, did Ms. Rexwinkle make specific requests for this

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[4]The parties disagree over whether the trustee expressly requested "all" accounts receivable information or merely the records for July-August of 1985 (the last billing period after the date of conversion). Apparently, only the July-August records were "lost." Since the court finds that debtors' failure to preserve and produce these records provides sufficient reason to deny discharge, the court need not reach the question of whether other specific accounts records were properly requested. However, the debtor's continued refusal to produce whatever extant records they did (and do) possess tends to confirm the bankruptcy judge's determination that information was concealed.

[5]Mr. Trader continues to deny ever making this statement. The bankruptcy judge specifically held that it credited the testimony of Mr. Pummill over that of Mr. Trader, noting the appropriate standards for so doing. *See Matter of Smith*, 68 B.R. 105, 110 (Bankr. W.D. Mo. 1986).

information. In any event, Dr. Crisp continues to maintain that back-up documents exist sufficient to allow reconstruction of the accounts receivable records. Yet, inexplicably, this information was never provided to the trustee.[6]

Given these facts, the bankruptcy court found that the debtors had failed to keep adequate records as required by section 727(a)(3). Specifically, the court found that if the records were lost when the computer was repossessed, debtors had failed to take adequate care to preserve those records. Thus, debtors' failure was not "justified under all the circumstances of the case." 11 U.S.C. § 727(a)(3). Alternatively, the court found that if, as Dr. Crisp contended, back-up information continued to exist which would allow reconstruction of 'the records, then debtors violated section 727(a)(3) by *concealing* important records, since this information had never been provided to the trustee despite the clear claim he had repeatedly made to it.

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[6]The trustee had earlier commenced an adversary action in bankruptcy court to compel Dr. Crisp to turn over the value of all accounts receivable not generated by his personal services (and thus not within the ambit of the exemption allowed in *In re Fitzsimmons*, 725 F.2d 1208 (9th Cir. 1984). This action was dismissed after the court held that the trustee failed to make a submissible case—chiefly because debtors had not provided the long sought after accounts information.

II. ANALYSIS

A. Standard of Review

Bankruptcy Rule 8013 provides that a district court reviewing the decision of a bankruptcy court shall not set aside findings of fact unless they are clearly erroneous. The district court must give due regard to the bankruptcy court's opportunity to judge the credibility of the witnesses and to its weighing of the evidence, although this court may make a *de novo* review of all conclusions of law. *In re Pierce*, 809 F.2d 1356, 1359 (8th Cir. 1987). Having reviewed the transcripts, the bankruptcy court's decision, and the parties' briefs, the court concludes that the bankruptcy judge did not clearly err in finding that debtors failed to keep and maintain adequate records or, alternatively, that they concealed such records. As a result, the bankruptcy court properly denied debtors' discharge pursuant to 11 U.S.C. § 727(a)(3).

Section 727(a)(3) requires a court to grant discharge to a debtor unless it is found that the debtor "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case." In challenges to discharge under section 727(a)(3), the initial burden of proof is on the creditors to show lack of records. *In re Savel*, 29 Bankr. 854, 856 (Bankr. S.D. Fla. 1983). "Once the creditors have satisfied their burden, the burden then shifts to the debtor to show that the absence of records is justified under all relevant circumstances." *Id.*; *see also In re Sheehan*, 350

F. Supp. 907, 911 (W.D. Mo. 1972).

Implicit in the bankruptcy court's determination that debtors failed to meet the requirements of section 727(a)(3) is the finding that any existing books or records which have been provided are somehow insufficient. A trial court is vested with wide discretion when making such a determination. *See Matter of Decker*, 595 F.2d 185, 187 (3d Cir. 1979); *Goff v. Russell Co.*, 495 F.2d 199, 202 (5th Cir. 1974); *In re Savel*, 29 Bankr. 854, 856 (Bankr. S.D. Fla. 1983). This is equally true when the question is whether circumstances justified the failure to keep or maintain certain records. *In re Kirst*, 37 Bankr. 275, 277 (Bankr. E.D. Wis. 1983); *see also Matter of Horton*, 621 F.2d 968, 971 (9th Cir. 1980) (bankruptcy court's findings as to debtor's failure to keep adequate records not an abuse of discretion).

B. Failure to Keep or Preserve Adequate Records

Debtors contend that specific, assembled accounts receivable information was not produced because of a loss beyond the debtors' control, but that the raw data from which these listings could be reconstructed were always available (although never requested). As for the Crisps' claim that their records were lost, it is true that the loss of records due to circumstances beyond a debtor's control may not warrant a denial of discharge. *In re Kirst*, 37 Bankr. 275, 277 (Bankr. E.D. Wis. 1983); *see also In the Matter of Martin*, 554 F.2d 55, 57 (2d Cir. 1977). However, to guard against an epidemic of mysterious disappearances of important financial information, "where the destruction [or loss] of pertinent financial records is unexplained, the debtor is not entitled to

receive the benefit of a discharge." *In re Hyder*, 38 Bankr. 467, 471 (Bankr. D. Mass. 1984). Not surprisingly, the debtor is also required to take reasonable precautions to *preserve* his records, "especially when he is aware that [the] records will be needed by the trustee or the creditors." *Id*; *see also In re Kottwitz* 42 Bankr. 566, 569 (Bankr. W.D. Mo. 1984); *In re Devine*, 11 Bankr. 487, 488 (Bankr. D. Mass. 1981).

In the instant case, Dr. Crisp was present at the Section 341 meeting when the importance of the accounts receivable information was emphasized, and he was later present at his office during the repossession of the computer system. When asked why he failed to oversee the repossession more closely, Dr. Crisp testified that he believed that A.M. Leasing had a right to all the equipment and supplies in the computer area, including the floppy disks. Yet, at another point, he testified that he had no concerns about the data disks because he assumed they would not be repossessed.[7] Although he was present at his office throughout the duration of the repossession, he took no pains to monitor what was being taken. Finally, Dr. Crisp also admitted that no back-up disks were kept. In short, while something evidently happened to the disks, the debtors completely failed to explain their fate or to provide any reasons why no steps were taken to ensure that these records were safe.

Once the trustee established that the Crisps failed to produce the records and that "a demand for an explanation

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[7]Transcript of January 14, 1987 at 12 and 49.

was made, the burden shifts to the debtor to justify the destruction or failure to produce records" *In re Hyder*, 38 Bankr. 467, 471 (Bankr. D. Mass. 1984). Dr. Crisp knew fully well the importance the trustee attached to the accounts receiveble records. He was present at the Section 341 meeting when Mr. Bohm announced the impending repossession. It was Dr. Crisp who first alerted the creditors that the accounts records were electronically stored. Indeed, because of his experience in advising other physicians on accounting standardization procedures on behalf of computer companies, Dr. Crisp should have been knowledgeable of the paramount necessity of preserving data. All of these factors point to the absence of a reasonable justification for the loss of the accounts receivable records.

C. The Issue of Concealment

Appellants argue that the bankruptcy court erred by alternatively finding that records were concealed. First, they contend that "concealment" was not an issue properly before the court because it was not specifically pled in appellee's complaint. Second, appellants argue that they concealed nothing, but that they were always able to produce back-up documents from which the records could be reconstructed. The bankruptcy court found that, if such were the case, the Crisps nevertheless failed to produce the back-up documents despite what should have been a crystal clear awareness of the trustee's demand. Thus, the court denied discharge on the separate and independent ground of con-

cealment of records.[8]

As for the claim that the issue of concealment was not properly before the bankruptcy court, this court notes that the trustee challenged discharge under one statutory section which plainly lists concealment of records as one basis for denial. If, as appellants contend, they preserved adequate back-up records but, as admitted, have not turned them over to the trustee, then the issue of concealment logically and inevitably arises under section 727(a) (3).[9] The court must underscore the fact that section 727(a) (3) not only requires a debtor to keep adequate records, but also that the records be *produced*. *In re Kottwitz*, 42 Bankr. 566, 569 (Bankr. W.D. Mo. 1984). Thus, "[e]ven though a court is unable to ascertain whether the debtor's failure to produce documents is because of concealment or destruction, his failure to produce suffices for a denial of discharge under Section 727(a)(3)." *In re Hyder*, 38 Bankr. 467, 471 (Bankr. D. Mass. 1984); *see also In re Nazarian*, 18 Bankr. 143, 149 (Bankr. D. Md. 1982).

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[8]The court notes that since failure to preserve the actual accounts listings without justification provides an adequate and independent ground for affirming the bankruptcy court, a prolonged discussion of whether there was subsequent concealment is probably unnecessary. However, for the sake of completing the record, the court shall nonetheless address all of appellants' arguments.

[9]In any event, the court would point out that issues not raised in a pleading may be treated as such if the parties actually try those issues. Fed. R. Civ. P. 15(b); Bankruptcy Rule 7015.

Debtors continue to maintain that the back-up documents were never specifically requested by appellee. However, the record undeniably shows that repeated requests for all available accounts receivable information had been made .throughout the dispute and up to the time of trial. It is unclear why the parties never completed the proposed reconstruction. What is clear, and what the bankruptcy court found, was that debtors should have been well aware of the trustee's desire to obtain all relevant records. A debtor is not to withhold any relevant information; the policy under section 727(a) (3) demands complete disclosure. *See In re Sheehan*, 350 F. Supp. 907, 911 (W.D. Mo. 1972). Once the debtor is on notice that the trustee seeks certain kinds of financial information, there should be no need to force additional requests for various specific or individual documents.

In the instant case, the record is replete with debtors' numerous denials, excuses and specious arguments—all this effort when it would have been far easier to simply give up what records they had. The court finds it difficult to believe that the Crisps or their counsel went to such trouble coincidently, or that they had no idea that the trustee required further records production. As a result, the court concludes that the bankruptcy court was correct in making its alternative findings and denying discharge on the basis of concealment.

D. Remaining Issues

Appellants also attempt to appeal what might be characterized as the scope of the denial order. First, appellants

make the curious argument that the denial of discharge somehow does not apply to creditors who failed to file their own section 523 or 727 actions. As for this assertion, the court is uncertain what kind of ruling appellants presently seek, nor is it clear how this could be a proper issue on appeal.[10] Be that as it may, the court will oblige appellants by advising them that discharge granted under section 727(b) applies to all debts, and conversely, a denial of discharge holds in place the status quo.

Finally, appellants contend that there was no evidence to support the finding that appellant Sandra Crisp either concealed or failed to preserve records. The bankruptcy court found that as a matter of law Ms. Crisp had the same duty to comply with section 727(a)(3) as did Dr. Crisp. This court agrees. Once the trustee established that no records were produced, *both* debtors then had the burden of coming forward with adequate justifications. There is sufficient evidence in the record to indicate that Sandra Crisp knew what was transpiring with respect to appellee's production requests. She was a full and equal party to all the bankruptcy proceedings and had every opportunity to offer some additional justification as to why the records were not produced. Thus, she must be bound by the denial of the discharge.

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[10]This specific contention was not advanced as an issue designated for appeal.

In summary this court concludes that the bankruptcy court's findings are supported by the record and cannot be said to be clearly erroneous. Accordingly, the decision of the bankruptcy court is affirmed.

JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

May 2, 1989